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4 SCOTT MICHAEL CONWAY,
5 Plaintiff,
6 v.
7 J. DIAS, et. al.,
8 Defendants.
9

10 Case No. 16-cv-0082-TEH
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12 ORDER OF SERVICE
13

14 Plaintiff, a detainee at Santa Clara County Jail, proceeds
15 with a pro se civil rights action under 42 U.S.C. § 1983. He has
paid the filing fee.

16 I
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18 Federal courts must engage in a preliminary screening of
19 cases in which prisoners seek redress from a governmental entity
20 or officer or employee of a governmental entity. 28 U.S.C. §
21 1915A(a). The Court must identify cognizable claims or dismiss
22 the complaint, or any portion of the complaint, if the complaint
23 "is frivolous, malicious, or fails to state a claim upon which
24 relief may be granted," or "seeks monetary relief from a
25 defendant who is immune from such relief." Id. § 1915A(b).
26 Pleadings filed by pro se litigants, however, must be liberally
27 construed. *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010);
28 Balistreri v. Pacifica Police Dep't., 901 F.2d 696, 699 (9th Cir.
1990).

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

II

Plaintiff states that one correctional officer retaliated against him and several officers assaulted him.

"Within the prison context, a viable claim of First Amendment retaliation entails five basic elements: (1) An assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal." Rhodes v. Robinson, 408 F.3d 559, 567-68 (9th Cir. 2005) (footnote omitted). Accord Pratt v. Rowland, 65 F.3d 802, 806 (9th Cir. 1995) (prisoner suing prison officials under § 1983 for retaliation must allege that he was retaliated against for exercising his constitutional rights and that the retaliatory action did not advance legitimate penological goals, such as preserving institutional order and discipline); Barnett v. Centoni, 31 F.3d 813, 816 (9th Cir. 1994) (per curiam) (same); Rizzo v. Dawson, 778 F.2d 527, 532 (9th Cir. 1985) (contention that actions "arbitrary and capricious" sufficient to allege retaliation).

The Due Process Clause of the Fourteenth Amendment protects

1 a post-arraignment pretrial detainee¹ from the use of excessive
2 force that amounts to punishment. Graham v. Connor, 490 U.S.
3 386, 395 n.10 (1989) (citing Bell v. Wolfish, 441 U.S. 520, 535-
4 39 (1979)); cf. Pierce v. Multnomah County, Oregon, 76 F.3d 1032,
5 1043 (9th Cir. 1996) (Fourth Amendment reasonableness standard
6 applies to allegations of use of excessive force against pre-
7 arraignment detainee). To prevail under 42 U.S.C. section 1983,
8 a pretrial detainee must show only that the "force purposely or
9 knowingly used against him was objectively unreasonable."
10 Kingsley v. Hendrickson, 135 S. Ct. 2466, 2473 (2015). "A court
11 must make this determination from the perspective of a reasonable
12 officer on the scene, including what the officer knew at the
13 time, not with the 20/20 vision of hindsight." Id. "A court
14 (judge or jury) cannot apply this standard mechanically." Id.
15 "[O]bjective reasonableness turns on the 'facts and circumstances
16 of each particular case.'" Id. (quoting Graham v. Connor, 490
17 U.S. at 396). A non-exhaustive list of considerations that may
18 bear on the reasonableness of the force used include "the
19 relationship between the need for the use of force and the amount
20 of force used; the extent of the plaintiff's injury; any effort
21 made by the officer to temper or to limit the amount of force;
22 the severity of the security problem at issue; the threat
23 reasonably perceived by the officer; and whether the plaintiff
24 was actively resisting." Id.

25 Plaintiff alleges that Defendant Alvarez threatened him if
26 Plaintiff did not address other inmates regarding their
27

28 ¹ Plaintiff appears to be a pretrial detainee. If he is a
convicted prisoner then the Eighth Amendment applies.

1 misconduct. Later Alvarez strip-searched Plaintiff and provided
2 clothes that were too small because Plaintiff failed to act upon
3 Alvarez's request. Liberally construed, this states a cognizable
4 claim of retaliation.

5 Plaintiff also alleges that Alvarez and several other
6 officers assaulted him by stomping on his feet, punching him in
7 the face, and hitting him in the area where he just had appendix
8 surgery. Plaintiff states he suffered excruciating pain.
9 Liberally construed this states a cognizable claim of excessive
10 force against these officers.

11 III

12 For the foregoing reasons, the Court hereby orders as
13 follows:

14 1. The Clerk of the Court shall issue summons and the
15 United States Marshal shall serve, without prepayment of fees, a
16 copy of the complaint (Docket No. 1), and a copy of this order
17 upon the following Defendants at Santa Clara County Jail:
18 Correctional Officer ("CO") J. Dias, CO Tejeda #10770, CO Ruban
19 #10766, CO Alvarez, Sgt. Pham #1714, and CO Duenas.

20 2. In order to expedite the resolution of this case, the
21 Court orders as follows:

22 a. No later than 91 days from the date of service,
23 Defendants shall file a motion for summary judgment or other
24 dispositive motion. The motion shall be supported by adequate
25 factual documentation and shall conform in all respects to
26 Federal Rule of Civil Procedure 56, and shall include as exhibits
27 all records and incident reports stemming from the events at
28 issue. If Defendant is of the opinion that this case cannot be

United States District Court
Northern District of California

1 resolved by summary judgment, he shall so inform the Court prior
2 to the date his summary judgment motion is due. All papers filed
3 with the Court shall be promptly served on the plaintiff.

4 b. At the time the dispositive motion is served,
5 Defendants shall also serve, on a separate paper, the appropriate
6 notice or notices required by Rand v. Rowland, 154 F.3d 952, 953-
7 954 (9th Cir. 1998) (en banc), and Wyatt v. Terhune, 315 F.3d
8 1108, 1120 n. 4 (9th Cir. 2003). See Woods v. Carey, 684 F.3d
9 934, 940-941 (9th Cir. 2012) (Rand and Wyatt notices must be
10 given at the time motion for summary judgment or motion to
11 dismiss for nonexhaustion is filed, not earlier); Rand at 960
12 (separate paper requirement).

13 c. Plaintiff's opposition to the dispositive motion,
14 if any, shall be filed with the Court and served upon Defendants
15 no later than thirty days from the date the motion was served
16 upon him. Plaintiff must read the attached page headed "NOTICE -
17 - WARNING," which is provided to him pursuant to Rand v. Rowland,
18 154 F.3d 952, 953-954 (9th Cir. 1998) (en banc), and Klingele v.
19 Eikenberry, 849 F.2d 409, 411-12 (9th Cir. 1988).

20 If Defendants file a motion for summary judgment claiming
21 that Plaintiff failed to exhaust his available administrative
22 remedies as required by 42 U.S.C. § 1997e(a), plaintiff should
23 take note of the attached page headed "NOTICE -- WARNING
24 (EXHAUSTION)," which is provided to him as required by Wyatt v.
25 Terhune, 315 F.3d 1108, 1120 n. 4 (9th Cir. 2003).

26 d. If Defendant wishes to file a reply brief, he shall
27 do so no later than fifteen days after the opposition is served
28 upon him.

1 e. The motion shall be deemed submitted as of the date
2 the reply brief is due. No hearing will be held on the motion
3 unless the court so orders at a later date.

4 3. All communications by Plaintiff with the court must be
5 served on defendant, or defendant's counsel once counsel has been
6 designated, by mailing a true copy of the document to defendants
7 or defendants' counsel.

8 4. Discovery may be taken in accordance with the Federal
9 Rules of Civil Procedure. No further court order under Federal
10 Rule of Civil Procedure 30(a)(2) is required before the parties
11 may conduct discovery.

12 5. It is Plaintiff's responsibility to prosecute this case.
13 Plaintiff must keep the court informed of any change of address
14 by filing a separate paper with the clerk headed "Notice of
15 Change of Address." He also must comply with the court's orders
16 in a timely fashion. Failure to do so may result in the
17 dismissal of this action for failure to prosecute pursuant to
18 Federal Rule of Civil Procedure 41(b).

19 IT IS SO ORDERED.

20 Dated: 02/17/2016



21
22 THELTON E. HENDERSON
23 United States District Judge

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NOTICE -- WARNING (SUMMARY JUDGMENT)

If defendants move for summary judgment, they are seeking to have your case dismissed. A motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case.

Rule 56 tells you what you must do in order to oppose a motion for summary judgment. Generally, summary judgment must be granted when there is no genuine issue of material fact--that is, if there is no real dispute about any fact that would affect the result of your case, the party who asked for summary judgment is entitled to judgment as a matter of law, which will end your case. When a party you are suing makes a motion for summary judgment that is properly supported by declarations (or other sworn testimony), you cannot simply rely on what your complaint says. Instead, you must set out specific facts in declarations, depositions, answers to interrogatories, or authenticated documents, as provided in Rule 56(e), that contradict the facts shown in the defendant's declarations and documents and show that there is a genuine issue of material fact for trial. If you do not submit your own evidence in opposition, summary judgment, if appropriate, may be entered against you. If summary judgment is granted, your case will be dismissed and there will be no trial.

NOTICE -- WARNING (EXHAUSTION)

If defendants file a motion for summary judgment for failure to exhaust, they are seeking to have your case dismissed. If the motion is granted it will end your case.

You have the right to present any evidence you may have which tends to show that you did exhaust your administrative remedies. Such evidence may be in the form of declarations (statements signed under penalty of perjury) or authenticated documents, that is, documents accompanied by a declaration showing where they came from and why they are authentic, or other sworn papers, such as answers to interrogatories or depositions. If defendants file a motion for summary judgment for failure to exhaust and it is granted, your case will be dismissed and there will be no trial.